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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 302

SWIFT & COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 269–288) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 115a–134a) are reported in 63 N. L. R. B. 718. The decision of the Board in the prior representation proceedings which forms part of the record in this case (R. 6a–16a) is reported in 56 N. L. R. B. 147.

JURISDICTION

The decree of the court below (R. 289–291) was entered June 26, 1947. The petition for a writ

of certiorari was filed August 27, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the court below properly enforced an order of the National Labor Relations Board requiring an employer to bargain collectively with a certified union although the employer offered to show that, after the issuance of the Board's order and after its own wrongful refusal to bargain had continued for an unbroken period of approximately two years, the union had ceased to be the choice of a majority of the employees in the unit.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (hereinafter referred to as "the Act") are set forth in the Appendix, *infra*, pp. 14–16.

STATEMENT

On December 2, 1943, United Packinghouse Workers of America, Local 49–A, C. I. O. (hereinafter referred to as "the Union") filed a petition with the Board under Section 9 (c) of the Act for investigation and certification of representatives of the clerical employees at the Company's Jersey City plant who had theretofore been excluded from a unit of production and maintenance

employees (R. 1a–2a).[1] After the usual hearing the Board issued a decision and direction of election in which it found that "all plant clerks, standards department checkers, storeroom clerks and commissary employees of the Company's Jersey City plant" with certain exclusions constituted an appropriate unit for collective bargaining, and directed that an election be held (R. 6a–16a). In this election, held on May 24, 1944, 20 of the 29 eligible voters selected the Union, and on June 5, 1944, the Board certified it as the exclusive bargaining representative of the employees in the unit found appropriate (R. 17a–18a).

After two unsuccessful efforts to engage in collective bargaining with the Company, the Union referred the matter to the Conciliation Service of the United States Department of Labor (R. 141a, 155a, 156a, 157a, 146a). The Company, in a letter to the Government conciliator, dated November 16, 1944—a copy of which it also sent to the Union—flatly announced its refusal "to bargain with the Union on matters relating to the Plant Clerks" and its intention to seek court review of any Board order that might issue because of petitioner's avowed refusal to negotiate (R. 141a, 148a, 158–159a).

[1] A coaffiliate of the Union had won a prior consent election and had been recognized by the Company as the bargaining representative of the production and maintenance employees (R. 24a–25a).

The Union thereupon filed charges that petitioner had refused to bargain with it as the exclusive representative of the employees in the certified unit, and the usual proceedings ensued under Section 10 (c) of the Act (R. 137a, 102a–103a). In its answer to the complaint issued by the Board, petitioner admitted its refusal to negotiate with the Union (137a, 104a–107a, 113a). The Board issued its decision and order on August 31, 1945, affirming its previous findings in the representation proceedings and finding further that petitioner's refusal to bargain constituted a violation of Section 8 (5) and (1) of the Act (R. 115a–118a, 123a–129a, 130a). The Board ordered petitioner to cease and desist from refusing to bargain with the Union and from engaging in any like or related acts or conduct interfering with, restraining, or coercing the employees; affirmatively, it ordered petitioner upon request to bargain collectively with the Union and to post appropriate notices (R. 116a–118a).

On September 12, 1946, the Board filed in the court below a petition to enforce the Board's order (R. 238–242). In its answer, petitioner challenged, as it did before the Board, the correctness of the Board's findings that the persons comprising the unit were employees within the meaning of the Act and that they could under all the circumstances form an appropriate unit (R.

243–248).[2] As to these contentions, the court below reaffirmed the Board's findings (R. 14a–15a, 16a, 124a–127a) that the persons sought to be represented by the Union were employees within the meaning of Section 2 (3) of the Act and that they constituted an appropriate unit (R. 273–278). A third contention passed upon by the court below involved the alleged loss by the Union of its majority status. This question arose while the instant case was pending in the court below. On November 25, 1946, subsequent to the filing of its answer to the Board's petition for enforcement of its order but prior to oral argument, petitioner filed a motion requesting the court below under Section 10 (e) of the Act to grant it leave to adduce before the Board additional evidence (R. 249–255). In support of its motion petitioner alleged, *inter alia,* that on November 4, 1946, it had received a communication stating that—

> We, the undersigned plant clerks and checkers do hereby state, that we do not wish to be represented by unionism in this plant (R. 252, 255).

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[2] In view of recent opinions by this Court (*Packard Motor Car Company* v. *National Labor Relations Board*, 330 U. S. 485; *National Labor Relations Board* v. *E. C. Atkins & Company*, No. 419, October Term, 1946, decided May 19, 1947; *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, No. 418, October Term, 1946, decided May 19, 1947), petitioner has now abandoned these contentions, and they are, therefore, not involved in the instant proceeding (Pet. 7).

Petitioner further alleged that this communication was signed by 20 of the 25 persons who on the date of the communication comprised the appropriate unit; that 13 of these 20 were not in the appropriate unit at the time of the election on May 24, 1944, but have since through the normal course of events come into this unit; and that the remaining 7 had been eligible to vote at the time of the election (R. 252). To compel the Company to bargain collectively with the Union under these circumstances, the motion set forth, would not serve the purposes of the Act (R. 253). The Board opposed the granting of the motion (R. 255–264), alleging that the assertion of a loss of majority came fully two years after its refusal to bargain, a refusal thereafter continuously adhered to (R. 257).[3] The Board alleged further that an intervening loss of majority, whether due to defections from union membership or to turn-over in working force, does not, on settled authority, relieve an employer of the remedial obligation to bargain with a union with which it has previously unlawfully refused to bargain (R. 257). Consequently, the Board informed the court below, even if all petitioner's

[3] Through an error in printing, the remainder of footnote 3 of the Board's Opposition to Petitioner's motion (R. 261) appears in the principal text, beginning with the words "This is not a case * * *" on p. 261 of the Record, and ending with the citation of the *Century Oxford* case on the fourth line of p. 262.

allegations were proved, it would have no choice but to reaffirm the propriety of its order in this case (R. 263). The Board, therefore, requested that petitioner's motion be denied, or, alternatively, that it be passed upon at the time of the presentation of the principal case (R. 264). After hearing argument on the motion, the court below declined to remand for the purpose of adducing additional testimony, but preserved the right of the petitioner to argue his legal point as though the evidence had been adduced (R. 266–267). In passing upon this contention in its principal opinion, the court below held that on settled authority the intervening loss of majority did not affect the validity of the Board's order that petitioner bargain collectively with the certified Union, and that adequate machinery existed under Section 9 of the Act for determining in subsequent certification proceedings questions of representation after the unfair practice impeding the employees' full freedom of choice had been expunged (R. 278–284). The court below therefore issued a decree enforcing the Board's order (R. 289–290).[4]

[4] The court below modified the Board's order by striking the portion thereof which provided that the petitioner cease and desist from engaging in "any like or related act or conduct, interfering with, restraining or coercing its employees * * *" (R. 284–288). This modification is not in issue here.

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ARGUMENT

The sole contention upon which petitioner predicates its attack on the validity of the court's decree enforcing the Board's order that it bargain collectively with the Union is its offer to show that the Union as of November 14, 1946, more than two years after its certification, was no longer the representative designated by a majority of the employees in the appropriate unit (Pet. 1, 5, 10, 20). Assuming all of petitioner's allegations as having been proved, all that is present in the instant case is the fact that after two years of a continued and wrongful refusal to bargain on the part of petitioner, the Union's majority, previously clearly established, has now become dissipated. The effect of a loss of majority subsequent to a wrongful refusal to abide by a lawful Board order to bargain collectively, is, so far as the law of labor relations is concerned, neither novel nor in doubt. The precise question was passed upon by this Court in the case of *Franks Bros. Company* v. *National Labor Relations Board,* 321 U. S. 702, in which it reaffirmed a similar holding in *National Labor Relations Board* v. *P. Lorillard Co.,* 314 U. S. 512, 513. In the *Franks* case, the opening sentence of the opinion reads (p. 702):

> The single question presented is whether the National Labor Relations Board acted within its statutory authority in ordering petitioner to bargain collectively with a

union which had lost its majority after petitioner wrongfully had refused to bargain with it.

To this question, this Court gave an unequivocal affirmative answer. Petitioner points to the fact that the opinion in the *Franks* case alludes to coercive tactics by the employer and that no such conduct was found in the instant case (Pet. 24). But the opinion of this Court in the *Franks* case shows that this Court regarded any refusal to bargain as disruptive of freely established employee designations of bargaining agents. Nor is the effect any the less disruptive where the refusal is, as petitioner here contends, a "technical refusal" (Pet. 23), based on a legal claim subsequently found to be without merit. Whatever the reason for the refusal, the employees were thereby for a prolonged period deprived of the benefits which petitioner's compliance with the lawful order would have afforded them.

The *Franks* case and the multiplicity of cases in accord therewith,[5] leave little room for further exposition. Petitioner, however, seeks to assert a conflict between the instant case and the decision

[5] See *N. L. R. B.* v. *Clinton E. Hobbs Co.*, 132 F. 2d 249, 252 (C. C. A. 1); *N. L. R. B.* v. *Somerset Shoe Co.*, 111 F. 2d 681, 690–691 (C. C. A. 1); *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 880 (C. C. A. 1), certiorari denied, 313 U. S. 595; *N. L. R. B.* v. *Federbush Co.*, 121 F. 2d 954, 956 (C. C. A. 2); *N. L. R. B.* v. *A Sartorius & Co*, 140 F. 2d 203 (C. C. A. 2); *N. L. R. B.* v. *Century Oxford Mfg. Co.*, 140 F. 2d 541, 542–543 (C. C. A. 2); *N. L. R. B.* v. *George P.*

of the Circuit Court of Appeals for the Fourth Circuit in *National Labor Relations Board* v. *Inter-City Advertising Co., Inc.*, 154 F. 2d 244. The existence of such a conflict is conclusively negated, however, by the opening phrases of the court's opinion in that case, which read as follows:

> This court has consistently upheld the National Labor Relations Board in its posi-

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Pilling & Son Co., 119 F. 2d 32, 39 (C. C. A. 3); *Oughton* v. *N. L. R. B.*, 118 F. 2d 486, 498 (C. C. A. 3), certiorari denied, 315 U. S. 797; *N. L. R. B.* v. *Poultrymen's Service Corp.*, 138 F. 2d 204, 211 (C. C. A. 3); *N. L. R. B.* v. *Moltrup Steel Products Co.*, 121 F. 2d 612, 618 (C. C. A. 3); *N. L. R. B.* v. *New Era Die Co.*, 118 F. 2d 500, 505 (C. C. A. 3); *N. L. R. B.* v. *Highland Park Mfg. Co.*, 110 F. 2d 632, 640 (C. C. A. 4); *Great Southern Trucking Co.* v. *N. L. R. B.*, 139 F. 2d 984, 985 (C. C. A. 4); *N. L. R. B.* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, 220–222; *N. L. R. B.* v. *Dixie Motor Coach Corp.*, 128 F. 2d 201, 202 (C. C. A. 5); *N. L. R. B.* v. *Whittier Mills Co.*, 111 F. 2d 474, 478 (C. C. A. 5); *N. L. R. B.* v. *Porcelain Steels Inc.*, 138 F. 2d 840 (C. C. A. 6); *N. L. R. B.* v. *Burke Machine Tool Co.*, 133 F. 2d 618, 621 (C. C. A. 6); *N. L. R. B.* v. *Swift & Co.*, 127 F. 2d 30, 32 (C. C. A. 6); *N. L. R. B.* v. *Chicago Apparatus Co.*, 116 F. 2d 753, 758 (C. C. A. 7); *M. H. Ritzwoller Co.* v. *N. L. R. B*, 114 F. 2d 432, 437–438 (C. C. A. 7); *Valley Mould & Iron Corp.* v. *N. L. R. B.*, 116 F. 2d 760, 765 (C. C. A. 7), certiorari denied 313 U. S. 590; *N. L. R. B.* v. *Blanton Co.*, 121 F. 2d 564, 569 (C. C. A. 8); *Bussmann Mfg. Co.* v. *N. L. R. B.*, 111 F. 2d 783, 788 (C. C. A. 8); *N. L. R. B.* v. *Crown Can Co.*, 138 F. 2d 263, 267 (C. C. A. 8); *N. L. R. B.* v. *Wm. Tehel Bottling Co.*, 129 F. 2d 250, 254 (C. C. A. 8); *N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 96 F. 2d 197, 198 (C. C. A. 9); *Continental Oil Co.* v. *N. L. R. B.*, 113 F. 2d 473, 480–481 (C. C. A. 10), certiorari denied in this respect, 311 U. S. 637; *Colorado Fuel & Iron Corp.* v. *N. L. R. B.*, 121 F. 2d 165, 175–176 (C. C. A. 10).

> tion that an employer must continue to bargain with the union certified by the Board to represent the majority of his employees, even after the union majority has been lost, *whenever there is reason to believe that the change was caused by refusal of the employer to bargain* or by other unfair labor practices on his part. [Italics supplied.]

After quoting from the *Franks* case, the opinion continues (p. 245):

> In the pending case we are asked to go a step further and to hold that the employer must bargain with a union which has lost its majority, where the change has not been occasioned by the refusal of the employer to bargain or by any other illegal practice on his part

The court then, after characterizing the case as an "unusual situation" (p. 245), interpreted the Board's decision as holding that the loss of majority could not be attributed either to the employer's refusal to bargain or to any other unfair labor practice on his part, and refused to enforce the Board's order that the employer bargain with the certified union (pp. 245–247).

In these circumstances, it is clear that, as the court below unmistakably indicated (R. 282), no conflict exists between the *Inter-City* case and the *Franks* case, and similarly none exists as to the instant case. The rationale of the *Inter-City* case that the statute precludes the union from speaking

for the employees where it does not represent the majority of such employees—a rationale which petitioner eagerly adopts (Pet. 32–33)—obviously has no application where the wrongful act of the employer has deterred the normal organizational activity of the employees, and prevented a union from obtaining the benefits normally accruing from its recognition. *Franks* case, at pp. 704–706.

Finally, petitioner argues that it was penalized by the court below for not seeking review of the Board's order under Section 10 (f) of the Act, rather than awaiting the Board's petition for enforcement. Aside from the fact that this argument has no bearing on the question presented to this Court for determination, it is quite clear from the opinion of the court below (R. 278–279) that the language referred to by the petitioner dealt merely with an analysis of petitioner's contention preliminary to dealing with the basic issue heretofore discussed.

CONCLUSION

The decision of the court below is clearly correct, and no conflict of decisions is presented. The petition for a writ of certiorari should, therefore, be denied.

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SEPTEMBER 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,*

That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

SEC. 10.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts

business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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